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DEPARTMENT OF STATE

22 CFR Part 40

[Public Notice: 10571]

RIN 1400-AE72

Visas: Waiver for Ineligible Nonimmigrants under Section 212(d)(3)(A)(i) of the Immigration and Nationality Act

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: Under the Immigration and Nationality Act (INA), a visa applicant found inadmissible is ineligible for a visa and for admission to the United States. The INA provides the Secretary of State and consular officers the authority to recommend that the U.S. Department of Homeland Security (DHS) approve a waiver, of most grounds of inadmissibility, that will allow the nonimmigrant visa applicant to be issued a visa and seek admission to the United States. This rule amends U.S. Department of State (“State”) regulations relating to consular officer recommendations relating to DHS waivers for nonimmigrant visa applicants, including the requirement that a consular officer, upon the request of an applicant, must submit a report to State concerning a waiver. Under the revised rule, consular officers will be required to refer waiver requests to State only when they involve security-related inadmissibility grounds or, with respect to applicant requests, only if the case meets circumstances where a referral is required by State guidance. The rule does not infringe current consular officer discretion to refer cases to State or to make recommendations directly to the Department of Homeland Security.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Taylor Beaumont, Acting Chief, Legislation and Regulations Division, Legal Affairs, Office of Visa Services, Bureau of Consular Affairs, 600 19th Street NW., Washington, DC 20522, 202-485-8910, VisaRegs@state.gov.

SUPPLEMENTARY INFORMATION: Aliens are ineligible to receive visas if they are inadmissible under any of the grounds in section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a). Section 212(d)(3)(A)(i) of the INA, 8 U.S.C. 1182(d)(3)(A)(i), authorizes the Department of Homeland Security to approve a waiver covering most grounds in section 212(a) of the INA, if the Secretary of State or a consular officer recommends that the alien be admitted temporarily into the United States, despite the inadmissibility. This provision does not authorize waivers under INA sections 212(a)(3)(A)(i)(I) (espionage or sabotage), (3)(A)(ii) (unlawful activity), (3)(A)(iii) (opposition to or overthrow of United States Government or opposition by force, violence, or unlawful means), (3)(C) (serious adverse foreign policy consequences), (3)(E)(i) (participation in Nazi persecutions), or (3)(E)(ii) (participation in genocide)). State regulations at 22 CFR 40.301 describe the authority of consular officers to recommend waivers.

For cases in which a nonimmigrant visa applicant is inadmissible based on an inadmissibility ground for which a waiver may be granted under section 212(d)(3)(A)(i) of the INA, and the consular officer has decided not to recommend a DHS waiver on the officer's own authority, but the applicant or an interested party insists on pursuing a

waiver, 22 CFR 40.301 currently requires the consular officer to refer the request to State for a possible exercise of the Secretary of State's authority to recommend a waiver to DHS. Neither section 212(d)(3)(A)(i) of the INA nor Department regulations prescribe standards or criteria for the consular officers making referrals to State. While the INA makes no express provision for the submission by nonimmigrant visa applicants of requests for section 212(d)(3)(A)(i) waivers, State created an avenue for such requests in 22 CFR 40.301(a). *See* 24 FR 6678, 6686 (1959) (formerly 22 CFR 41.95(a)).

This final rule modifies the non-statutory requirement for consular officers to refer section 212(d)(3)(A)(i) waiver requests to State for consideration based on an applicant's request, by limiting it to specified circumstances. This rule will increase transparency for inadmissible aliens seeking an exercise of the Secretary's authority to recommend DHS grant a waiver, and will limit the requirement that consular officers refer waiver requests to circumstances that involve a key State interest, as reflected in the enumerated criteria. This rule has no impact on cases involving security-related grounds of inadmissibility, which consular officers must consider in accordance with other State guidance, on consular officers' existing discretion to pursue waivers on behalf of ineligible visa applicants, or on the factors DHS considers in exercising its section 212(d)(3)(A) waiver authority.

Under this rule, which constitutes an exercise of the Secretary of State's authority under section 212(d)(3)(A)(i) of the INA, consular officers are required to refer waiver requests to State in response to a request from the Secretary of State, whose request shall be presumed to meet one of the criteria (paragraphs 1-5) enumerated below, or in

response to a request from a visa applicant for a case that the consular officer has reason to believe involves one of the following circumstances:

1. Foreign Relations: Refusal of the nonimmigrant visa application would become a bilateral irritant or be raised by a foreign government with a high ranking United States Government official;

2. National Security: The nonimmigrant visa applicant's admission to the United States would advance a U.S. national security interest;

3. Law Enforcement: The nonimmigrant visa applicant's admission to the United States would advance an important U.S. law enforcement objective;

4. Significant Public Interest: The nonimmigrant visa applicant's admission to the United States would advance a significant U.S. public interest ; or

5. Urgent humanitarian or medical reasons: The nonimmigrant visa applicant's admission to the United States is warranted due to urgent humanitarian or medical reasons.

Consistent with this exercise of the Secretary's authority to recommend a waiver under section 212(d)(3)(A)(i) of the INA, this rule also clarifies that requests by the Secretary for a consular officer to submit a report to State are presumed to involve one of the enumerated circumstances. In addition, this rule includes technical edits to improve the structure and clarity of 22 CFR 40.301, revise the heading of paragraph (b) to clarify that consular officers are permitted to submit recommendations to a designated DHS office, and eliminate the requirement that the Secretary of State define certain categories of cases for which consular officers may recommend waivers directly to DHS.

The rule clarifies existing State guidance that consular officers may refer to State, but may not submit directly to DHS, a recommendation to DHS to waive certain security-related grounds of inadmissibility and the rule narrows the scope of other situations in which consular officers must refer waiver cases to State, upon request of the applicant or on their own initiative, to those cases the consular officer believes meet one of the criteria enumerated below. This rule does not affect consular officers' existing authority or discretion to submit non-security related waiver recommendations directly to DHS or refer cases to State. The vast majority of waiver recommendations to DHS under section 212(d)(3)(A)(i) of the INA are initiated by consular officers without applicant requests. The rule does not limit, in any way, DHS's independent discretionary authority to approve or deny a waiver. Finally, the rule applies only to visa applications for which the consular officer conducts an in person interview under section 222(h) of the INA on or after the rule's effective date.

In all cases in which the consular officer: (1) determines a nonimmigrant visa applicant is not eligible for a visa due to inadmissibility; (2) decides not to recommend directly that DHS grant a waiver; (3) would choose not to refer the case to State to consider pursuing a waiver, but the applicant continues to request a waiver; (4) determines that there is no reason to believe that one of the criteria for referral to State are met; the officer will refuse the visa application without referring the case to State, notwithstanding the applicant's request. In cases where an applicant requests a waiver referral to State, the adjudicating consular officer will determine whether the case involves one of the enumerated five criteria and will inform the applicant whether or not the officer will make the referral to State. While there is no mechanism for applicants to

seek reconsideration or appeal of a consular officer's determination that the request does not satisfy one of the enumerated criteria, affected applicants may submit new nonimmigrant visa applications with information justifying a waiver under one of the enumerated grounds.

Regulatory Findings:

Administrative Procedure Act

This rule constitutes a rule of policy and procedure, and as a result, it is exempt from notice and comment under 5 U.S.C. 553(b)(3)(A). This final rule limits the non-statutory requirement that consular officers refer requests for waivers under INA section 212(d)(3)(A) to the Department, by specifying limited circumstances, based on a new policy, in which such referrals are required. Because this is a rule of policy and procedure, it is effective upon publication in the *Federal Register*.

Regulatory Flexibility Act/Executive Order 13272: Small Business

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, consistent with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Department of State certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal governments, or by the

private sector. This rule does not require the Department of State to prepare a statement because it will not result in any such expenditure, nor will it significantly or uniquely affect small governments. This rule involves visas, which involves individuals, and does not directly or substantially affect, state, local, or tribal governments, or businesses.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These Executive Orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department of State has examined this rule in light of Executive Order 13563, and has determined that the rulemaking is consistent with the guidance therein. The Department of State has reviewed this rulemaking to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866. The Office of Information and Regulatory Affairs (OIRA) has determined this rule to be a significant, though not economically significant,

regulatory action. Consequently, OIRA has reviewed this rule. This rule will ensure consistency with U.S. and international law and the increased clarity will benefit the U.S. public. There are no anticipated direct costs to the public associated with this rule.

Executive Orders 12372 and 13132: Federalism

This regulation will not have substantial direct effect on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

Executive Order 12988: Civil Justice Reform

The Department of State has reviewed the rule in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175—Consultation and Coordination With Indian Tribal

Governments

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

Executive Order 13771

This rule is not subject to the requirements of Executive Order 13771 because it is *de minimis*.

Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 40

Aliens, Immigration, Visas

Accordingly, for the reasons set forth in the preamble, 22 CFR part 40 is amended to read as follows:

PART 40—REGULATIONS PERTAINING TO BOTH NONIMMIGRANTS AND IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

1. The authority citation for part 40 is revised to read as follows:

Authority: 8 U.S.C. 1104, 8 U.S.C. 1182.

2. Section 40.301 is revised to read as follows:

§ 40.301 Waiver for ineligible nonimmigrants under INA 212(d)(3)(A).

(a) *Recommendations under INA 212(d)(3)(A)(i).* (1) Consular officers, on their own initiative in cases they believe meet one of the criteria in paragraphs (a)(2)(i) through (v) of this section, may submit a report to the Department for possible transmission to the designated DHS office pursuant to INA 212(d)(3)(A)(i) (8 U.S.C. 1182(d)(3)(A)(i)), in the case of an alien who is classifiable as a nonimmigrant but who the consular officer knows or believes is ineligible to receive a nonimmigrant visa due to inadmissibility under the provisions of INA 212(a) (8 U.S.C. 1182(a)), other than INA 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), or (3)(E)(ii).

(2) In response to a request from the Secretary of State, which shall be presumed to meet one of the criteria in paragraphs (a)(2)(i) through (v) of this section, or in

response to a request from a visa applicant for a case that the consular officer has reason to believe meets one of the criteria in paragraphs (a)(2)(i) through (v), consular officers are required to submit a report to the Department for possible transmission to the designated DHS office pursuant to INA 212(d)(3)(A) in the case of an alien who is classifiable as a nonimmigrant but whom the consular officer knows or believes is ineligible to receive a nonimmigrant visa due to inadmissibility under the provisions of INA 212(a), other than INA 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), or (3)(E)(ii).

(i) *Foreign Relations*: Refusal of the nonimmigrant visa application would become a bilateral irritant or be raised by a foreign government with a high ranking United States government official;

(ii) *National security*. The nonimmigrant visa applicant's admission to the United States would advance a U.S. national security interest;

(iii) *Law enforcement*. The nonimmigrant visa applicant's admission to the United States would advance an important U.S. law enforcement objective;

(iv) *Significant public interest*. The nonimmigrant visa applicant's admission to the United States would advance a significant U.S. public interest, or

(v) *Urgent humanitarian or medical reasons*. The nonimmigrant visa applicant's admission to the United States may be warranted due to urgent humanitarian or medical reasons.

(b) *Recommendation to designated DHS office*. Consular officers may recommend directly to the designated DHS office that the alien be admitted temporarily despite his or her inadmissibility in any case where a waiver may be available, unless the consular

officer has reason to believe that the applicant is inadmissible under INA 212(a)(3)(A)(i), (3)(A)(ii), (3)(A)(iii), (3)(B), (3)(C), (3)(D), (3)(E)(i), (3)(E)(ii), (3)(E)(iii), (3)(F), or (3)(G) . The Department may recommend that the Secretary of Homeland Security waive ineligibility under any ground in section 212(a) of the INA, except for sections 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), and (3)(E)(ii).

(c) *Secretary of Homeland Security may impose conditions.* When the Secretary of Homeland Security authorizes the temporary admission of an inadmissible alien as a nonimmigrant and the consular officer is so informed, the consular officer may proceed with the issuance of a nonimmigrant visa to the alien, subject to the conditions, if any, imposed by the Secretary of Homeland Security.

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